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No. 05-134

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

****

STATE OF NORTH CAROLINA,

Petitioner

v.

MONICA D. BRANCH,

Respondent

****

On Petition for a Writ of Certiorari
To The North Carolina Court of Appeals

****

RESPONDENT'S BRIEF IN OPPOSITION

****

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QUESTION PRESENTED

Whether the North Carolina Court of Appeals correctly ruled that conducting a canine sniff at a driver's license checkpoint, absent reasonable suspicion, exceeds the scope of a *Terry* stop?

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF CASES AND AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE PETITION..... 4

Illinois v. Caballes does not control dog sniffs conducted at driver's license checkpoints. The North Carolina Court of Appeals was correct that dog sniffs cannot be conducted at *Terry* stops absent reasonable suspicion..... 4

CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)..... 5

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000)..... 6,7

Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)..... 4

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)..... 5

Illinois v. Caballes, __ U.S. __, 125 S.Ct. 834, 125 L.Ed.2d 842 (2005)..... 7

State v. Milien, 144 N.C. App. 335, 548 S.E.2d 768 (2001)..... 5

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)..... 4,5,7

United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)..... 4

United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985)..... 5

Constitution

United States Constitution

Amendment IV..... 5
Amendment XIV..... 5

STATEMENT OF THE CASE

A. Testimony Elicited at the Hearing on Ms. Branch's Motion to Suppress.

On 4 November 2000, the Community-Oriented Policing Unit (hereinafter "COP") of the Sheriff's Department of Rockingham County, North Carolina established a checkpoint at the intersection of four highways not known for a high level of drug activity. (Mp. 6, 30) "COP" was responsible on a daily basis for investigating street level drug activity and was assisted in conducting drug investigations by trained narcotics-detection dogs. (Mp. 16, 18) The 4 November 2000 checkpoint, established for the announced purpose of stopping all oncoming traffic to verify driver's licenses and vehicle registrations (Mp. 6), was staffed by "COP" deputies, two canine ("K-9") officers and their dogs, and various patrol units. (Mp. 4, 15, 37)

According to "COP" Deputy Marcus Marshall, each vehicle was to be stopped for approximately forty seconds in order for the driver to produce a license and vehicle registration. (Mp. 35) An officer could pull a vehicle out of the checkpoint if the driver failed to produce a license, produced a license or registration with facial violations, was subject to outstanding warrants, or if the officer detected the odor of alcohol or illegal substances. (Mp. 15-16, 27, 35) If a vehicle was pulled out of the checkpoint for a computer license check, the officer could extend the duration of the stop by requesting a warrant check. (Mp. 15, 36)

The "K-9" officers were posted at two of the four checkpoint stations and were idle until an officer checking vehicles called for their assistance. (Mp. 37-38) Deputy Marshall testified that the narcotics-detection dogs were present to assist officers who smelled alcohol or illegal substances. (Mp. 15) When asked why the dogs were needed if officers were only pulling out vehicles which emitted smells the officers detected, Marshall responded, "There may be instances where we have been familiar with people that have used narcotics substances or are

known drug users or known drug sellers." (Mp. 16) As to people recognized by police as having "been involved with drugs or always in high drug areas," (Mp. 34) Marshall stated:

> Most of the time when we ask for the license and registration, if they can produce that, we still do our investigative stop, as far was [sic] where are you going; where you coming from. It just depends on the situation. Each situation is different. (Mp. 34)

Monica Branch stopped at the checkpoint manned by Deputy Marshall. She produced a facially valid duplicate driver's license and the vehicle registration. (Mp. 24) Marshall recognized that the license was valid (Mp. 24), but decided that her presentation of a duplicate license "gave me enough to pull her over to get her checked." (Mp. 27) He did not testify that he knew or suspected that Ms. Branch's license had been revoked and that she presented a duplicate license to avoid revealing her true driving status. Instead, he testified that "there are times we have people to [sic] come through with a valid license and their license is revoked." (Mp. 25) He claimed he also needed to see if Ms. Branch was subject to outstanding warrants. (Mp. 27) He did not testify that he knew of any outstanding warrants on Ms. Branch. Rather, he testified that he pulled out drivers "if it's someone that we think we have warrants on...." (Mp. 27)

After Marshall pulled Ms. Branch out of the checkpoint, he showed her license to "K-9" Deputy Randy Howell. Howell also recognized that the license was facially valid. (Mp. 39) As he had arrested Ms. Branch ten months before for "a violation for which I felt her license could have been revoked," he concurred that it was best to check the license status. (Mp. 39, 51) Marshall asked Howell to step over to Ms. Branch's vehicle with his narcotics-detection dog, although Marshall had not smelled alcohol or illegal substances. (Mp. 28-30) The only

circumstance Marshall cited as supporting his decision to conduct a drug investigation was his knowledge of

> the past history of Ms. Branch. I knew that she had been – that she had used illegal substances before. I've known Ms. Branch as being in high crime drug areas, areas in my area of the county that I work, which is the south side of Reidsville; and that was another reason I had Deputy Howell to step over to the vehicle. (Mp. 29)

Marshall knew that a license and warrant check would take several minutes. (Mp. 36) He asked Howell to step over to the car while the check was in process. (Mp. 28) Within five minutes, dispatch advised Marshall that Ms. Branch's license was valid and no outstanding warrants against her existed. (Mp. 26, 28, 30) When he informed Howell of the dispatch results, the two discussed something that Marshall could no longer recall. (Mp. 32) Howell then told him that his dog had alerted to the presence of narcotics. (Mp. 32-33) Marijuana stems and butts were found in the vehicle ashtray (Mp. 44-46), 0.6 grams of marijuana was found in a container in Ms. Branch's purse (Mp. 47-48), and 0.3 grams of cocaine was found inside Ms. Branch's brassiere. (Mp. 50)

B. How the Question was Presented on Direct Appeal.

Ms. Branch challenged the legality of Deputy Marshall's decisions (1) to pull her out of the checkpoint upon her presentation of a facially valid driver's license and (2) to conduct a narcotics investigation. The North Carolina Court of Appeals ruled that Ms. Branch was lawfully pulled out of the checkpoint, but that Marshall's decision to conduct a drug investigation in the absence of reasonable suspicion violated *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *State v. McClendon*, 130 N.C. App. 368, 502 S.E.2d 902 (1998); and *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358 (1998).

The State of North Carolina filed a Petition for Discretionary Review in the North Carolina Supreme Court challenging the ruling regarding the drug investigation. Ms. Branch filed a combined Petition for Discretionary Review on the lawfulness of the detention and a Response to State's Petition. On 1 April 2004, the North Carolina Supreme Court accepted the State's Petition for Discretionary Review and denied Ms. Branch's Petition. On 7 April 2005, after full briefing and oral argument, the Supreme Court dismissed review of the State's Petition as improvidently granted. The State's request for rehearing was denied on 26 April 2005.

REASONS FOR DENYING THE WRIT

ILLINOIS v. CABALLES DOES NOT CONTROL DOG SNIFFS CONDUCTED AT DRIVER'S LICENSE CHECKPOINTS. THE NORTH CAROLINA COURT OF APPEALS CORRECTLY DECIDED, IN ACCORDANCE WITH PRECEDENT OF THIS COURT, THAT DOG SNIFFS CANNOT BE CONDUCTED AT *TERRY* STOPS ABSENT REASONABLE SUSPICION.

This Court has made clear that motorists are not at the mercy of the police every time they start their automobiles.

> Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio*, [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)], recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Delaware v. Prouse, 440 U.S. 648, 662-663, 99 S.Ct. 1391, 1400-1401, 59 L.Ed.2d 660, 673 (1979). While police may stop motorists at license or sobriety checkpoints, the "principal protection of the Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-557, 96 S.Ct. 3074,

3087, 49 L.Ed.2d 1116, 1133 (1976). The North Carolina Court of Appeals correctly ruled, in accordance with precedent of this Court, that conducting a canine sniff of a driver and her vehicle at a license checkpoint exceeded the appropriate limitations on police conduct, who are limited by the Fourth Amendment to conducting only such investigation "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, *supra*, 392 U.S. at 20, 88 S.Ct. at 1879, 20 L.Ed.2d at 905.

In *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-1326, 75 L.Ed.2d 229, 238 (1983), quoted by the Court of Appeals in resolving this issue, this Court stated:

> The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

When the scope of a *Terry* stop is exceeded in either its duration or the investigation performed, the seizure is unreasonable and therefore unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution, *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605, 615 (1985), as the right to detain does not confer a corresponding right to "discover evidence of crime...." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617 (1972).

Deputy Marshall testified that police were conducting a driver's license checkpoint. (Mp. 4) He testified that signs were posted on the highways alerting drivers that they were approaching a license checkpoint. (Mp. 6) He testified that this was not a warrant checking station (Mp. 26), but claimed that police can always stop any driver at any time when they know or suspect that the driver is subject to outstanding warrants. (Mp. 27)

Ms. Branch, however, was subjected to a narcotics investigation while her license and warrant status were being checked. Deputy Marshall's decision to conduct a narcotics investigation was not pursuant to any programmatic purpose, since he did not testify that this was a narcotics interdiction checkpoint or that any guidelines governed an officer's decision-making process as to when and how to conduct a narcotics investigation at a license checkpoint. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). Marshall did not testify that all cars stopped at the checkpoint were subjected to a canine sniff or even that all cars pulled out of the checkpoint were subjected to a canine sniff. He simply decided "pretty much of my own initiative" to conduct this narcotics investigation (Mp. 41), since he happened to have been able to detain Ms. Branch by virtue of her stopping at the checkpoint.

This was a classic violation of *Terry*. Narcotics dogs could lawfully have been utilized at this license checkpoint only if they constituted an investigative method capable of verifying or dispelling an officer's suspicion as to the validity of a driver's license. While Howell testified that the narcotics-detection dogs were indeed "busy checking licenses" at the checkpoints (Mp. 38), a claim that the dogs assisted in license checks is preposterous. As intelligent and resourceful as dogs may be, they could not possibly have assisted police in determining the licensing or registration status of any motorist or vehicle. Narcotics-detection dogs perform one task and one task alone: assisting in the gathering of evidence of drug-related criminality. The dogs were thus used for a purpose unrelated to the reason for the detention and used wholly at the unbridled discretion of individual officers.

Police may "act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose." *City of Indianapolis v. Edmund*,

supra, 531 U.S. at 47, 121 S.Ct. at 457, 148 L.Ed.2d at 347. As in any *Terry* stop, the reasonableness of such police action is determined not by the officer's "inchoate and unparticularized suspicion or 'hunch,' but [by] the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, *supra*, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. Deputy Marshall did not testify to a single objective circumstance justifying expanding the scope of this checkpoint stop to a narcotics investigation. He did not testify that Ms. Branch took evasive action to try to avoid stopping at the license checkpoint. He did not testify that she was unable to properly operate her car. He did not testify that she was glassy-eyed or nervous, avoided eye contact, provided inconsistent information, or refused to produce the requested documents. He did not testify that he smelled any odor associated with narcotics. He simply claimed the right to conduct the investigation because he wanted to. The United States Constitution did not give him that right.

Although *Illinois v. Caballes*, __ U.S. __, 125 S.Ct. 834, 125 L.Ed.2d 842 (2005), had not been decided when the opinion issued in this case, *Caballes* does not affect the analysis the Court of Appeals used. *Caballes* was not a license checkpoint case. *Caballes* was not a *Terry* stop case. Mr. Caballes was stopped upon probable cause after having been observed violating traffic laws by speeding on the highway. During the period of time in which he was detained for initiation of the criminal process, police conducted a canine sniff of his vehicle. As this Court noted, the *certiorari* grant in *Caballes* was very narrow, *id.* at 837, 160 L.Ed.2d at 846, and its holding likewise very narrow. As Justice Souter noted in dissent, the narrowness of the Court's holding does not signal "recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car...." *Id.* at 842, 160 L.Ed.2d at 852.

The decision by the Court of Appeals herein was consistent with decades of *Terry* stop cases and with this Court's rejection in *City of Indianapolis v. Edmond* of narcotics-detection checkpoints. Accordingly, no grounds exist to grant *certiorari*.

CONCLUSION

For the foregoing reasons, this Court should decline to grant *certiorari* to review the issue presented by the Petitioner.

Respectfully submitted, this the 15th day of August, 2005.

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CERTIFICATE OF SERVICE

****

I, Barbara S. Blackman, a member of the bar of this Court, hereby certifies under penalty of perjury that on the 15th day of August, one copy of the Brief in Opposition to Petition for Writ of Certiorari and Ms. Branch's Request to Proceed *In Forma Pauperis* in the above-entitled case were served on William P. Hart, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Petitioner herein, by first-class mail, postage prepaid. I further certify under penalty of perjury that all parties required to be served have been served.

Respectfully submitted, this the 15th day of August, 2005.

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